Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

FLORIDA DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

vs.

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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79 pp

QUESTIONS PRESENTED FOR REVIEW

The State of Florida seeks relief from an administrative order requiring the state to repay $961,003 in funds received by the State to implement training services under the Job Training Partnership Act of 1982, 29 U.S.C. § § 1501 *et seq.* ("JTPA"). The Secretary of the United States Department of Labor ("USDOL") found that "profits" earned on contracts for training services were unreasonable and unnecessary. Based on four contracts produced during the proceeding, the Secretary also ruled that the USDOL met its burden of production for the purpose of establishing that 250 contracts did not meet the requirements for fixed unit contracting in accordance with 20 C.F.R. § 629.38 (e)(2). The Court of Appeals affirmed.

The Questions Presented are:

I. Whether the decision rendered by the Secretary as affirmed by the Eleventh Circuit ignored express congressional intent to decentralize the authority from the federal government to the several states and local entities under the Job Training Partnership Act of 1982?

II. Whether the decision of the Eleventh Circuit Court of Appeals is in direct conflict with a Supreme Court decision and with decisions rendered by other circuit courts of appeals?

III. Whether the Eleventh Circuit has sanctioned a blatant departure from law established by the Supreme Court and law established in its own circuit to the extent that this Court should exercise its supervisory powers?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the captioned of the case. There is no parent of subsidiary company of any party to be listed.

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OPINIONS BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit is set forth in Appendix B. It has not been published.

The order of the United States Court of Appeals for the Eleventh Circuit denying the Petitioner for Rehearing and Suggestion of Rehearing En Banc is set forth in Appendix A.

The decision of the Administrative Law Judge of the United States Department of Labor is set forth in Appendix C ("App."). It has not been published.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Eleventh Circuit was entered April 9, 1996. The order denying the Petition for Rehearing and Suggestion of Rehearing En Banc was entered July 1, 1996. Jurisdiction of this Court is invoked under 28 U.S.C. § 1578(b) and 28 U.S.C. § 1254 (1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 28 U.S.C. § § 1501 *et seq.*, pertinent parts are set forth in Appendix D.

STATEMENT OF THE CASE

The Florida Department of Labor and Employment Security, hereinafter "Florida," requested an administrative hearing on the Final Determination issued by the Grant Officer, pursuant to § 166 of the Job Training Partnership Act, 1982 (JTPA), 29 U.S.C. § 1501 *et seq.*, the Wagner Peyser Act (WPA), as amended by the JTPA, and its regulations at 20 C.F.R. § 629.57, *et seq.*

The Final Determination found that Florida had accumulated profits of $961,003 as a result of its administration of the Job Training Partnership Act (JTPA) over a (7) seven year period, and specifically from approximately 250 fixed unit priced performance based contracts executed between Florida, its Service Delivery Areas and various Employment Security Job Service Offices.

Prior to the hearing which was conducted by an Administrative Law Judge (ALJ), Florida took depositions, conducted discovery and filed a Motion For Summary Judgment and a Motion to Dismiss contending that there were no disputed issues of fact, as USDOL had not set forth any factual basis upon which to establish deficiencies in 250 contracts. Both motions were argued on July 19, 1993, prior to the hearing.

On July 6, 1993, (13) thirteen days before the hearing and after the parties had submitted pre-hearing statements, the ALJ ordered Florida to produce at the final hearing, one contract for each program year in question, in spite of oral and written objections from Florida. At the hearing, the state produced four contracts, one for each contract year 1983 through 1989, and USDOL produced one contract. Contracts for 1983 through 1985, had been destroyed prior to the audit in question, consistent with 20 C.F.R. § 629.35(e) which required grant recipients to retain records for a three year period. On August 19, 1993, the Grant Officer filed a post-hearing motion for order finding that the contracts not produced by Florida would have been adverse to Florida. The ALJ denied the motion by order dated December 2, 1993, and further found that to grant such relief would dispose of a large portion of the case on a technicality.

On May 2, 1994, the ALJ issued his final decision and

Order which granted Florida's motion for summary judgment in part and is located at App.C). He further found that by merely producing one contract during the hearing the Grant Officer failed to meet his initial burden of production to substantiate that 250 contracts violated the provisions of 20 C.F.R. § 629.38(e)(2) (App. D, p. 33a) or § 629.37(a) (App. D, p. 31a). The ALJ found no specific violation of the JTPA or the regulations and accordingly reversed the Grant Officer's disallowance of $961.003.

On May 23, 1994, the Grant Officer filed exceptions to the ALJ's decision with the Secretary, who accepted the case for review on June 8, 1994. By Final Order and Decision dated December 5, 1994, the Secretary reversed the ALJ and ruled that the Grant Officer had met his burden of production and had properly disallowed $961,003. On December 29, 1994, Florida filed a timely appeal to the Eleventh Circuit Court of Appeals.

Briefs were submitted by Florida and by USDOL according to the briefing scheduled approved by the court. By Order dated April 9, 1996, the United States Court of Appeals for the Eleventh Circuit issued its order which affirmed the order issued by the Secretary reversing the findings of the ALJ (App. C). Agreeing with the Secretary, the court ruled that the record contained substantial evidence to support the Secretary's findings that the profits earned on contracts reflected costs which were not necessary or reasonable for the efficient administration of the JTPA program as required by 20 C.F.R. § 629.37(a) (App. D, p. 31a). As the profits were lawfully earned by various service providers who were awarded contracts through state approved competitive procurement procedures, the ruling ignores the expressed congressional intent underlying the JTPA. That intent was to defer to the autonomy of the states; thereby, reinforcing the systems of the dual sovereignty between the states and the federal

government, as established by the Constitution. 1982 U.S.C.C.A.N. 2636. (App. D, p. 50a). Florida filed a timely Motion for Rehearing En Banc, which was denied by the Court of Appeals on July 1, 1996.

It is from the decision issued by the Eleventh Circuit Court of Appeals affirming the Secretary's reversal of the findings of the ALJ and requiring Florida to repay $961,003 to USDOL that Florida is now respectfully submitting its Petition for Writ of Certiorari to this Court.

REASONS FOR GRANTING THE WRIT

This case has important implications regarding the allocation of powers between the federal government and the several states, as envisioned by Congress in enacting the Job Training Partnership Act of 1982. The legislation was designed to end federal involvement in the details of training program operations. 1982 U.S.C.C.A.N. 2636-2637 (App. D, p. 51a).

Despite the clearly stated legislative intent, the Secretary, and the Eleventh Circuit by its affirmation of the Secretary's decision, have retreated from the distribution of authority as intended under the JTPA.

In finding that contracts procured pursuant to state requirements violate the spirit of federal law, the Secretary and the Eleventh Circuit have ignored the autonomy of the states, as envisioned by Congress. The contracts in question were competitively procured under the oversight of the state. (*See* ALJ Order, App. C, p. 25a).

The Governor's function under the JTPA is more than merely funneling federal money to local job training programs;

rather the Act recognizes the role of the state in all local programs and ends the excessive involvement of the government. *Romero-Barcelo v. Donovan*, 722 F.2d 882, 886 (1st Cir. 1983).

The present petitioner maintains that it is important that this Court address what the court in *Romero-Barcelo, supra*, at 886, has recognized as the tension between the competing policies of efficient planning and decentralized administration which are embodied in the Job Training Partnership Act.

I.

THE DECISION RENDERED BY THE SECRETARY AS AFFIRMED BY THE ELEVENTH CIRCUIT, IGNORED THE EXPRESS CONGRESSIONAL INTENT TO DE-CENTRALIZE THE AUTHORITY FROM THE FEDERAL GOVERNMENT TO THE SEVERAL STATES AND LOCAL ENTITIES UNDER THE JOB TRAINING PARTNERSHIP ACT OF 1982.

The effect of the order of the Secretary is to resurrect the federally centralized administration of JTPA grants, in contravention of the clearly expressed intent of Congress.

The 97th Congress enacted the JTPA to replace the Comprehensive Employment and Training Act (CETA), a federally sponsored job training program. 1982 U.S.C.C.A.N. 2636-2659 (App. D, pp. 49a-58a). CETA had proven less than extravagantly successful; "informed opinion seems to suggest that *excessive federal involvement* was partially to blame for CETA's problems." *Hernandez-Colon v. Secretary of Labor*, 835 F.2d 958 (1st Cir. 1988). With the failures of CETA in focus, Congress designed the JTPA and opined that the new law would "substitute state management for federal management of

the job training function, recognize the role of the state in all local programs, and end the excessive involvement of the federal government." *Id.* at 961, N.3, *citing* S. Rep. No. 469, 97th Cong. 2d Sess. 2, reprinted in 1982 U.S. Code Cong. and Admin. News 2636, 2637. (App. D, p. 51a).

Congress was also guided by four basis principles it deemed essential for an effective job training program. These required the Governor and private sector involvement, with emphasis on performance results.

First, Congress insisted that the new legislation provide for the involvement of the private sector in the design and administration of training programs.

Second, Congress expressed its desire that job training legislation recognize the true principles of federalism. The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.

Third, the job training legislation was designed to truly be a training legislation and not an income maintenance program.

Fourth, the legislation contains an emphasis on performance. The 1982 legislation required standards for judging the programs by what they accomplish-by whether those trained are hired and earn more as a result of training. By the 1982 JTPA, Congress sought to end federal involvement with the process of how people are to be trained. Its purpose was to provide for measurement of the outcomes and remove the federal government from involvement in the details of program operations. 1982 U.S.C.C.A.N. 2637-2638 (App. D, p. 51a).

In recognition of these principles, which clearly supplanted the federal government from administration of the JTPA and gave the primary responsibility to the Governor, regulations were promulgated at 20 C.F.R. parts 626 through 638. The provision at 20 C.F.R. § 627.1 embodies the fundamental notions of federalism Congress sought to embrace in the JTPA. The provision required the Secretary and Governor to sign an agreement which specified that the:

> . . . guidelines interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

20 C.F.R. § 627.1 (App. D, p. 29a).

Clearly, this provision captured the congressional intent to respect and defer to the autonomy of the states, and reinforced the system of dual sovereignty between the states and the national government, as established by the United States Constitution.

The Senate in discussing its notion of federalism, provided in relevant part:

> Under the legislation reported by the Committee, the state will be the key actor in the approval of job training programs. First, and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas. This critical determination will be done by the Governor after receiving the proposals of local government and

> business officials. The Governor will also be in charge of approving local developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. In short, the basic supervisory role previously performed by the federal government will now be turned over to the state, the place where it really belongs.

1982 U.S.C.C.A.N. 2638 (App. D, p. 53a).

The Secretary and the Circuit Court have overlooked the law in determining that substantial evidence supports the disallowance. Both failed to apply the guidelines, definitions and interpretations of the Governor in determining whether the contracts violated the Act or regulations. Unlike most federal grant programs, the states did not accept JTPA funds with condition or understanding that expenditures must conform to the Secretary's interpretation of the Act and regulations. *Cf. Bennett v. Kentucky,* 105 S. Ct. 1544, 1552 (1985). Even under such other grants, the Supreme Court has reserved for later decision the questions of whether an agency could impose liability for expenditures made in reliance upon earlier interpretations by the agency or whether a state may be held liable where its interpretation of an ambiguous requirement is more reasonable than an interpretation by the agency after the grants were made. *Bennett* at 1552-1553.

Under JTPA, Florida took the funds on USDOL's regulatory promise that the Secretary would accept Florida's definitions and interpretations. In *Bennett,* without a regulation such as 20 C.F.R. § 627.1 before it, the Supreme Court refused to accept the Government's contention that the

Secretary "may rely on any reasonable interpretation of the requirements of Title I to determine that previous expenditures violated the grant conditions." *Bennett* at 1552. The Eleventh Circuit's holding in this case would allow USDOL to override the Governor's guidelines, interpretations, and definitions even though USDOL had no guidelines, interpretations or definitions, of its own and in spite of the regulation that required USDOL to accept the Governor's interpretations. *See* 20 C.F.R. § 627.1 (1984).

The Eleventh Circuit also overlooked 20 C.F.R. § 629.34, which required states to administer procurement systems that reflect state and local law, rules and regulations as determined by the Governor. 20 C.F.R. § 629.34. The applicable standard was the guidelines, definitions, interpretations, and procurement policies of the state. Because the contracts complied with this standard, there was no violation of the Act or regulations to support the sanction of repayment.

The matter before this Court involves an understanding and interpretation of the JTPA and its regulations. While the law and its regulations are complex, Congress was emphatically clear on its desire to recognize the role of the state in all local programs and to end the excessive involvement of the federal government. Legislative History of the JTPA at S. Rep. No. 469, 97th Cong. 2d Sess. 2 (1982), U.S. Code Cong. & Admin. News 1982, 2637.

II.

THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS IS IN DIRECT CONFLICT WITH A SUPREME COURT DECISION AND WITH DECISIONS RENDERED BY OTHER CIRCUIT COURTS OF APPEALS.

The Eleventh Circuit Court of Appeals' decision in this case raises important issues of national significance and is in direct conflict with the law established by this Court in *Bennett v. Kentucky,* at 105 S. Ct. 1544, *supra,* a decision which involved the administration of federal grants at the state level, which similar federal funds were at issue in this case.

In *Bennett v. Kentucky, supra,* this Court reviewed efforts by the federal government to recover Title I educational funds which were allegedly misued by the State of Kentucky. In upholding the disallowance this Court observed that the federal government established the guidelines for allocation and use of the funds and the state agreed to comply those guidelines while utilizing said funds. *Id.* at 1552. However, this Court also held that the federal government could not resolve every possible ambiguity concerning the particular applications of the Title I requirements and refused to resolve any ambiguities in the Title I requirements against the federal government as the drafter of the grant agreement, opining that the government could not prospectively resolve every possible ambiguity concerning the application requirements of Title I.

The case at bar involves an agreement between Florida and the Seceretary of USDOL, where in direct contrast to the facts in Bennett, the Secretary of USDOL expressly agreed to accept the guidelines, interpretations and definitions adopted by the Governor, if such were not inconsistent with the JTPA law and

regulations. Contrary to the position furthered by this Court in *Bennett*, Florida was not accorded any deference regarding the authority the states were granted under the JTPA to have control over the policies and procedures related to the administration of the JTPA program.

The Eleventh Circuit case is also in direct conflict with the law in the Ninth Circuit, as set forth in *Chicano Education and Manpower Service v. Department of Labor,* 909 F. 2d 1320, 1327 (9th Cir. 1990), *citing Service v. Dulles,* 354 U.S. 363, 77 S. Ct. 1152, 1 L. Ed. 2d 1403 (1957), which law requires administrative agencies to adhere to their own regulations. In the *Chicano* decision, the Ninth Circuit Court of Appeals reviewed a decision rendered by the Secretary of the U.S. Department of Labor under the CETA program, which required the repayment of funds expended in violation of the anti-nepotism regulation. However, the Court, holding that an agency must follow its own regulations, found that the Secretary erred as a matter of law by failing to consider the application of the agency's regulation which governed waiver of repayment in her decision, and consequently the Ninth Circuit remanded for such consideration of the regulation to be accorded by the Secretary. *Id.* at 1328.

Here, the Eleventh Circuit's affirmance of the Secretary's decision permits USDOL to violate its own regulations regarding record retention found at 20 C.F.R. § 629.35(e), by holding Florida and other JTPA programs accountable for contracts and records that have been properly destroyed pursuant to the federal retention provisions. In this case such had occurred even before USDOL conducted its audit of Florida's Revenue Account. As contracts for program years 1983 through 1985 had been destroyed during the audit and prior to the time of the trial, before the ALJ, USDOL's audit and disallowance of the Revenue Account covered a seven year

period, in total disregard of its own three year records retention regulation should not be allowed.

III.

THE ELEVENTH CIRCUIT HAS SANCTIONED A BLATANT DEPARTURE FROM LAW ESTABLISHED BY THE SUPREME COURT AND LAW ESTABLISHED IN ITS OWN CIRCUIT TO THE EXTENT THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWERS.

The Eleventh Circuit, in *Florida Department of Labor v. U.S. Department of Labor,* 893 F.2d 1319 (11th Cir. 1990), echoed the established principle that reviewing Courts have the authority and responsibility to correct errors of law made by an agency during its decision making process. In *Florida Department of Labor, supra,* the Eleventh Circuit held that it will not allow misconceptions in law that arise during the agency decision-making process to stand but rather will exercise authority and responsibility to correct those errors of law made by the agency. *Id.* at 1320. In that case, the Court reviewed a Decision and Order issued by the Secretary of the U.S. Department of Labor which imposed prejudgment interest against the Florida Department of Labor. The issue was whether the Secretary had authority to collect interest from States. The court clearly recognized its independent obligation to consider the legal issue and also to consider whether either party had raised the issue below; however, the court held that an order cannot stand where the agency has misapplied the law, whether or not the issue was raised below. *Id.* at 1322.

In this case the Eleventh Circuit deviated from its holding in Florida Department of Labor, *supra,* by allowing the Secretary of USDOL to misapply the JTPA law and regulations

in several instances in support of his reversal of the decision of the ALJ. The Secretary's usurpation of the of the authority of the Governor is in direct conflict with the JTPA regulations at 20 C.F.R. § 627.1, which requires the Governor and the Secretary to sign a Governor/Secretary Agreement whereby the Secretary agreed to accept the guidelines, interpretations, and definitions adopted by the Governor if such were consistent with the Act and applicable rules and regulations. Contrary to the agreement which was executed between Florida and the Secretary where the Secretary vowed to respect and defer to the autonomy of the Governor, the Secretary has been allowed to unlawfully breach that agreement and usurp the authority accorded the Governor by Congress under the JTPA. Such action if allowed to stand will have far reaching and profound adverse effects on the JTPA training program nation wide.

The Court deviated from established law in the Circuit with regards to the blanket disallowances it sanctioned regarding the Title III contracts. A misapplication of the law occurred by the affirmance of the Secretary's decision to disallow costs associated with all of the Title III contracts and to deem them violative of 20 C.F.R. § 629.38(e)(2) for containing elements of both fixed unit and actual cost reimbursement contracts. There is no provision in the law or regulations which prescribes such elements in fixed unit contracts.

Likewise, the Eleventh Circuit's decision which sanctions the Secretary's disallowance of costs associated with contracts executed with Wagner Peyser funds, based on an alleged violation of 20 C.F.R. § 629.38(e)(2) is contrary to any requirements in the law or regulations. The USDOL conceded at the trial that the Wagner Peyser contracts were not required under the law or regulations to adhere to the requirements of 20 C.F.R. § 629.38(e)(2), yet, the erroneous legal standard applied to disallow the costs was permitted by the court without any

explanation. As the Eleventh Circuit failed to provide any explanation for the Secretary's failure to give recognition to the distinction in law between contracts funded pursuant to the JTPA and those funded pursuant to the Wagner Peyser Act, this case will generate confusion and conflict of legal authority throughout the Job Training Community across this country. Job training programs in all (50) fifty states will suffer legal vulnerability to the whims of the Secretary, absent any statutory or regulatory basis.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 1, 1996

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 94-3613 & 95-2218

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

versus

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petitions for Review of an Order
of the United States Department of Labor

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC (Opinion _____, 11th Cir., 19__, ____ F.2d ____).

Before: ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc

Appendix A

(Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ illegible
UNITED STATES CIRCUIT JUDGE

ORD-42
(6/95)

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED APRIL 9, 1996

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NOS. 94-3613 & 95-2218

D.C. Docket No. 92-JTP-17

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Petitioner,

versus

UNITED STATES DEPARTMENT OF LABOR,

Respondent.

Petitions for Review of an Order
of the United States Department of Labor

(April 9, 1996)

Before ANDERSON and BLACK, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

This appeal arises from a Final Decision and Order of the

Appendix B

United States Secretary of Labor ("Secretary"), requiring the Florida Department of Labor and Employment Security ("FDLES") to remit to the United States Department of Labor ("DOL") profits it accumulated as a result of its administration of job training and placement programs funded by the Job Training Partnership Act, 29 U.S.C. §§ 1501 *et seq* , ("JTPA"), and the Wagner-Peyser Act, 29 U.S.C. §§ 49 *et seq*.[1] Because substantial evidence supports the Secretary's decision, we affirm.

I. BACKGROUND

The JTPA and the Wagner-Peyser Act provide, *inter alia*, grants of federal money to state and local governments to establish job training and placement programs for economically disadvantaged persons. The Governor of Florida has charged the FDLES with the responsibility of administering -the state's JTPA job programs.[2] In that capacity, the FDLES maintains a JTPA revenue account.

In 1991, a Grant Officer of the DOL, Office of the Inspector General, conducted an audit of the revenue account for the Florida program years 1983 through 1989. He determined that, during this period of time, the account had accumulated $961,003.00 in "net profits" which were "inappropriately charged to the training cost category."[3] (Grant Officer's Final

---

1. The final order of the Secretary is directly appealable to this court pursuant to 29 U.S.C. § 1578(a)(1).

2. For purposes of this opinion, references to the JTPA programs include job services funded by the Wagner-Peyser Act.

3. Wagner-Peyser Act appropriations were the source of $35,230.00 of the profits.

Determination at 2). The profits were derived from approximately 250 fixed unit price performance ("fixed unit") contracts made between the FDLES or one of its Service Delivery Areas ("SDAs") and various offices of the Florida Employment Security Job Service ("Job Service"), which provide job training and placement assistance.[4] In the Grant Officer's Opinion, the fixed unit method of contracting was not acceptable where it permitted one unit of the FDLES to earn profits on the federal funds distributed by another unit of FDLES. He noted also that, because the contractors' primary source of income was federal money, any losses incurred would be absorbed by the use of other federal funds. In the Grant Officer's view, this set of circumstances eliminated the normal profit-loss incentives for fixed unit contracting.[5] For this same reason he concluded that the contracts were not negotiated as arms-length transactions. He further found that the terms of the contracts did not comply with the regulations governing fixed unit contracts set forth at 20 C.F.R. § 629.38(e)(2).[6] Based on

---

4. According to the record, two types of contracts for job training and placement services were permissible under the JTPA — fixed unit and cost reimbursement. A fixed unit contract establishes a certain price for training and job placement. This method of contracting allows the contractor to make a profit if its actual costs fall below the contract price. By the same token, the contractor may incur a loss if its costs exceed the contract price. By contrast, a cost reimbursement contract provides that the contractor will be paid only the actual cost of training or placing a participant.

5. Evidence in the record indicates that the rationale behind fixed unit contracting is that, in a competitive marketplace, it provides contractors with the financial incentive to better serve more participants.

6. The current regulations governing the JTPA have been revised and renumbered and appear at 20 C.F.R., Parts 626 through 628, 631 through 634 (Cont'd)

these findings, he issued a final determination requiring that the profits be recaptured by the DOL.[7]

Thereafter, the FDLES sought review by an Administrative Law Judge ("ALJ"). 20 C.F.R. § 629.57. At the administrative

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(Cont'd)
and 636 through 638. The regulations cited in this opinion are those that were in effect during the period of time covered by the audit. Section 629.38(e)(2) provided in relevant part:

> Costs which are billed as a single unit charge do not have to be allocated or prorated among the several cost categories but may be charged entirely to training when the agreement:
>
> (i) Is for training;
>
> (ii) Is fixed unit price; and
>
> (iii) (A) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less than the wage specified in the agreement[.]

According to the audit, the terms of the contracts impermissibly included payment for the direct placement of participants who received no training, full reimbursement to employers for on-the-job training and supportive services costs and eighty percent of all actual allowable training costs, in addition to the fixed unit costs.

7. The final determination confirmed that $73,448.00 of the profits could be "reprogrammed" into allowable JTPA services.

hearing conducted by the ALJ, the FDLES contended that the DOL failed to meet its burden of production to establish a *prima facie* case that its administration of the JTPA programs resulted in impermissible profits. It asserted that the Grant officer reviewed only one out of the approximately 250 contracts at issue in the audit, an agreement between the Manasota Industry Council, Inc.[8] and the FDLES (the "Manasota contract"). It maintained that the DOL could not presume, from reviewing the Manasota contract, that the remaining 249 contracts suffered from the same defects. Moreover, it argued that the Manasota contract should not even be considered because it had been the subject of a prior audit which resulted in a settlement agreement. Finally, it contended that it was entitled to retain the profits because the JTPA regulations permitted fixed unit contracting and a publication issued by the United States Office of Management and Budget ("OMB"), OMB Circular A-87, did not proscribe the generation of profits thereby.[9]

During the hearing, a witness for the DOL acknowledged that, except for the Manasota contract, the agreements from which the profits stemmed were not examined. Instead, the auditor considered only whether the contracting entities were units of the FDLES. He attached a list to the audit naming the parties to the agreements under investigation. In view of the dispute over whether a determination could be made without considering the actual terms of each contract, the ALJ directed

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8. The Manasota Industry Council, Inc. is one of the state's SDAs.

9. The OMB has issued various publications to provide guidance to state and local governments in administering job programs funded by federal grants. OMB Circular A-87 stated in relevant part that "[n]o provision for profit or other increment above cost is intended." OMB Circular A-87, *quoted in* 53 Fed. Reg. 40,352 (1988).

the FDLES to produce all of them for his review. However, counsel for the FDLES came to the hearing with only four contracts for submission into evidence, one from each of the program years 1986 through 1989.[10] She informed the ALJ that producing the remaining contracts would require the transportation of forty to fifty boxes of documents. She indicated that this was unnecessary because the terms of the four contracts proffered were essentially the same as the other agreements in issue. She did not dispute that all of the contracts listed in the audit were fixed unit contracts between various divisions of the FDLES and that profits had been generated as found by the Grant Officer. The ALJ accordingly accepted the proffer of the four contracts produced, which were admitted into evidence as Complainant's Exhibits 32 through 35.

In spite of this concession, the ALJ, in his subsequent decision, inexplicably stated that the only contract in evidence was the Manasota contract. He found that its terms did not comply with the fixed unit requirements of § 629.38(e)(2), but held that this single contract was not enough to sustain the DOL's burden of production to establish a *prima facie* case that all of the contracts likewise failed to conform. Next, the ALJ considered whether the profits were "necessary and reasonable" within the meaning of 20 C.F.R. § 629.37(a).[11] In this connection, the ALJ again observed that the DOL had failed to satisfy its initial burden of production. He also found that, although the practice of contracting between divisions of the

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10. According to the briefs, the contracts for the program years prior to 1986 had been destroyed in accordance with records retention regulations.

11. Section 629.37(a) stated in relevant part that, "[t]o be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program."

FDLES created "an obvious conflict of interest," (ALJ's decision at 8), the regulations did not specifically require that contracts be negotiated at arms-length to be considered necessary and reasonable. For these reasons, and because the regulations did not expressly prohibit the state's retention of profits generated through its administration of the program, the ALJ concluded that the Grant Officer's determination should be reversed.[12]

The ALJ's decision was then reviewed by the Secretary. 29 U.S.C. § 1576(b). The Secretary found, contrary to the ALJ, that the DOL met its burden of production through the four contracts that were in evidence in addition to the Manasota contract. He noted that the attorney for the FDLES conceded at the administrative hearing that the four contracts were representative of all of the contracts involved in the audit. The Secretary found that an examination of the four contracts revealed that each of them contained terms in contravention of 629.38 (e) (2).[13] Specifically, in addition to a fixed unit price, the contracts permitted payment for the placement of participants who received no training and for certain actual training and supportive services costs. Thus, the agreements impermissibly included elements of both fixed unit and actual

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12. The ALJ also addressed whether a three-year statutory time limit for expending program funds had elapsed. This was relevant to whether the profits could be reprogrammed into permissible JTPA activities and is not an issue before the court on appeal.

13. We note that the agreements involving Wagner-Peyser Act funds did not fall within the scope of § 629.83(e)(2). With respect to those contracts, the DOL considered only whether they were negotiated at arms-length and whether the profits were necessary and reasonable. (*See* Admin. Tr. at 191).

cost reimbursement. The Secretary concluded that, because these agreements were representative of the others, it could be presumed that the remaining contracts were written in the same manner. With respect to whether the profits were necessary and reasonable, the Secretary found that the consistent pattern of excess earnings, year after year, belied a finding that the state's JTPA administrators were prudently managing the programs, incurring only the acceptable costs. The Secretary considered that the absence of regulations delineating criteria for arms-length negotiations did not excuse the state's failure to follow sound business practices. The Secretary consequently reversed the ALJ and reinstated the Grant Officer's final determination. The FDLES now appeals the decision of the Secretary.

II. DISCUSSION

This court's review of the Secretary's final order is governed by 29 U.S.C. § 1578(a) (3). It provides that "[r]eview shall be limited to questions of law and the Secretary's findings of fact shall be conclusive if supported by substantial evidence." The order and burden of proof in a JTPA administrative hearing are established by the regulations. They state:

> *Burden of production.* The [DOL] shall have the burden of production to support the Secretary's decision. To this end, the Secretary shall prepare and file an administrative file in support of the decision. Thereafter, the party or parties seeking to overturn the Secretary's decision shall have the burden of persuasion.

20 C.F.R. § 629.57(i).[14]

On appeal, the FDLES continues to urge that the Manasota contract was insufficient to meet the DOL's burden of production and did not constitute substantial evidence in support of the Secretary's decision. This argument is foreclosed, however, by the fact that there were four other contracts in evidence, which the state agrees were representative of all of the contracts. The FDLES does not dispute that those four contracts contained elements of both fixed unit and actual cost reimbursement in contravention of § 629.38 (e)(2). The DOL consequently met its burden of production with respect to this issue and the burden shifted to the FDLES to persuade the Secretary that the remaining contracts were somehow different. Not only did the FDLES fail to satisfy this burden, it insisted that the other contracts were of the same type. We find, therefore, that substantial evidence supports the Secretary's decision that none of the contracts qualified as fixed unit agreements written in accordance with § 629.38(e)(2).[15]

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14. The current version of this regulation is found in 20 C.F.R. § 627.802(e).

15. The FDLES also reiterates its position that the settlement agreement that arose out of the prior audit of the Manasota contract barred the DOL from relying on that document as evidence of the state's noncompliance with the regulations. This issue need not be resolved in view of our finding that the four other contracts constituted substantial evidence in support of the Secretary's decision. The FDLES additionally complains that the Grant Officer erroneously included among the disallowed costs, $45,139.00 in profits stemming from the Manasota contract. (Appellant's Initial Brief at 20-21). This assertion was not developed in the administrative proceedings. Consequently, we do not consider it on appeal. *See* 29 U.S.C.

(Cont'd)

We likewise find that substantial evidence supports the Secretary's finding that the profits were not necessary and reasonable to the efficient administration of the JTPA programs as required by § 629.37(a). Again, the FDLES claims that the DOL failed to meet its burden of production on this point. It does not deny, however, that its method of contracting resulted in a consistent pattern of profits over a period of years. Given the interrelated nature of the contracting entities, a prudent administrator would have scrutinized the level of funding expended in this manner even though the regulations did not specifically prohibit it. Testimony at the administrative hearing revealed that Florida's own Auditor General questioned the practice of fixed unit contracting between the various arms of the FDLES and suggested that it seek advice from the DOL as to whether it was appropriate. Florida's Governor chose not to follow this course of action. (Admin. Tr. at 99, 101, 144, 167). We find, therefore, that the DOL's burden of production was satisfied and it was up to the FDLES to persuade the Secretary that the profits were necessary and reasonable. It failed in its effort.[16]

(Cont'd)

§ 1578 (a) (3) ("No objection to the order of the Secretary shall be considered by the court unless the objection shall have been specifically and timely urged before the Secretary.").

16. The FDLES has insisted throughout this case that, because the regulations permitted fixed unit contracting, it is entitled to retain the profits generated thereby. Even if the contracts had conformed to the fixed unit criteria contained in § 629.38(e)(2), the fact that the regulations allowed this form of contracting does not translate into a finding that the fixed unit method of contracting was necessary and reasonable to the efficient administration of the program.

Appendix B

III. CONCLUSION

Our review convinces us that substantial evidence supports the Secretary is final order requiring the FDLES to remit the profits at issue in this case to the DOL. It is therefore AFFIRMED.

APPENDIX C — DECISION AND ORDER OF THE U.S. DEPARTMENT OF LABOR, OFFICE OF ADMINISTRATIVE LAW JUDGES RECEIVED MAY 6, 1994

U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, N.W.
Washington, D.C. 20001-8002

Case No. 92-JTP-17

In the Matter of:

STATE OF FLORIDA, DEPARTMENT OF LABOR AND EMPLOYMENT SECURITY,

Complainant

v.

UNITED STATES DEPARTMENT OF LABOR,

Respondent

Appearances: Carolyn D. Cummings, Esq.,
On behalf of the Complainant

Frank P. Buckley, Esq.,
On behalf of the Respondent

Before: G. MARVIN BOBER,
Administrative Law Judge

Appendix C

DECISION AND ORDER

This case arises under the Job Training Partnership Act (JTPA), 29 U.S.C. § 1501 *et seq.*, and the regulations promulgated thereunder appearing at 20 C.F.R. § 626 *et seq.* The purpose of the JTPA is to train youths and unskilled adults for entry into the labor force, as well as to provide job training to the economically disadvantaged and others who face serious obstacles to obtaining employment.

Stipulations of Fact

The parties have agreed on the following facts:

1. From the inception of the JTPA to program year 1989,[1] Florida's Employment Service Job Service (ESJS) offices entered into contracts to provide job training and placement services to eligible participants;

2. The audit in question covered the period from the inception of the JTPA through program year 1989;

3. The JTPA, Wagner Peyser Act, regulations, and cost principles did not prohibit the use of fixed unit price performance-based contracts by governmental entities during the period covered by the audit;

4. Revenue in excess of cost was generated from the contract performance and service provision of ESJS;

5. The regulations and cost principles did not prohibit

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1. The JTPA program year begins on July 1 of the fiscal year for which JTPA funds are appropriated. 29 U.S.C. § 1571(a).

the earning of revenue in excess of cost by governmental entities during the period covered by the audit;

6. The JTPA, Wagner Peyser Act, regulations and cost principles did not require that profits properly earned by governmental entities be recaptured by the United States Department of Labor (USDOL);

7. The JTPA and its regulations delegated authority to the Governor to establish policy directions on profits and on the fixed unit price performance-based contracting method and to the extent that they were consistent with the JTPA and applicable rules and regulations, they would be accepted by the Secretary of Labor;

8. Florida was obligated to accept guidelines adopted by the Governor if consistent with the JTPA and its regulations;

9. During the period covered by the audit, USDOL did not promulgate any rules or regulations which prohibited the use of fixed unit price performance-based contracts;

10. During the period covered by the audit, USDOL did not promulgate any rules or regulations which prohibited the generation of profits;

11. The first official interpretation by USDOL on the utilization of fixed unit price performance-based contracts and on the disposition of revenue in excess of cost was issued in the Federal Register on March

13, 1989, with an effective date of July 1, 1989;

12. USDOL did not deem profits to be program income until July 1, 1989;

13. USDOL did not promulgate any rules or regulations as guidance on contract negotiation; and

14. The interpretative regulation has no retroactive effect on the period between 1982 and July 1, 1989.

Issues

By agreement of the parties, the following issues remain for resolution:

1. Whether the Florida Department of Labor and Employment Security (DLES) must return to USDOL net profits realized from contract performance by ESJS offices under fixed unit price performance-based contracts;

2. Whether DLES inappropriately charged profits to the training cost-category;

3. Whether the contractual terms in question violated provisions of 20 C.F.R. § 629.37(a), 20 C.F.R. § 629.38(e)(2), and OMB Circular A-87;[2]

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2. These provisions upon which USDOL relied during its audit of DLES are contained within the 1992 JTPA regulations. The regulation contained in 20 C.F.R. § 629.37(a) now appears at 20 C.F.R. § 627.435(a) in the current regulations. 20 C.F.R. § 627.435(a) (1993). The previous regulation at 20 C.F.R. § 629-38(e)(2) no longer appears in the current JTPA regulations.

Appendix C

4. Whether the Division of Labor, Employment and Training (DLET), ESJS and the service delivery areas (SDAs), negotiated contracts at arm's length;

5. Whether fixed unit price performance-based contracting method is a permissible form of contracting with respect to the questioned costs; and

6. Whether the three-year availability period for the funds in question has lapsed.

Summary of Facts

DLES is the administrative recipient of JTPA funds for the Governor of Florida. On September 18, 1991, USDOL, Office of the Inspector General, issued a final audit report based on its investigation of the JTPA revenue account maintained by DLES. Specifically, the audit focused on revenue accrued from the 1984 program year to the 1989 program year. Upon receipt of the audit report, the State of Florida submitted a proposed resolution of the audit findings on October 24, 1991. However, since USDOL found Florida's proposed resolution to be unsatisfactory, the USDOL Grant Officer commenced the initial and final determination process pursuant to 20 C.F.R. § 629.54(d).[3] (CX-1 at A-12.)[4]

The Grant Officer issued his initial determination on December 17, 1991. Following this initial determination,

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3. For the current version of this regulation, *see* 20 C.F.R. § 627.606 (1993).

4. The following abbreviations will be used herein: Complainant's Exhibit — "CX;" Respondent's Exhibit — "RX;" and the hearing transcript — "Tr."

USDOL and DLET convened in Washington, D.C., for an informal resolution meeting. As the informal meeting yielded no settlement of the case, the Grant Officer issued a final determination on March 18, 1992. In his final determination, the Grant Officer concluded that $961,003.00 in JTPA revenues accumulated during the 1984 to 1989 program years by DLES should be disallowed. Of this amount, the Grant Officer determined that $887,555.00 should be returned to USDOL and that $73,448.00 could be reprogrammed for use in JTPA-related training services as long as the reprogrammed funds were obligated prior to June 30, 1992. Finally, the Grant Officer concluded that Florida's policy with respect to the use of fixed unit price performance-based contracts needed to be expanded to include other contracting methods. (CX-1 at A-8.)

Shortly thereafter, Complainant filed a timely request for hearing with the Office of Administrative Law Judges (OALJ) pursuant to 20 C.F.R. § 655.630.[5] In accordance with Complainant's request for judicial/administrative review of the Grant Officer's final determination, a hearing was conducted on July 19, 1993, in Tallahassee, Florida. During the course of the hearing, both parties were afforded a full opportunity to present testimony and submit evidence under the provisions of the JTPA. At the close of the hearing, the parties were permitted to submit post-hearing briefs. (Tr. at 284.)

Complainant's Motion for Summary Judgment

Before moving to the merits of this case, I must address Complainant's motion for summary judgment. Summary judgment is proper only when the pre-trial record demonstrates

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5. *See also* 20 C.F.R. § 627.801 (1993).

that there is "no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Furthermore, in considering Complainant's summary judgment motion, I must view the underlying facts and all reasonable inferences drawn therefrom in favor of the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Nonetheless, once the moving party has met its burden under Federal Rule 56(c), the opposing party must do more than merely show that there is a metaphysical doubt as to the material facts. *Matsushita*, 475 U.S. at 574, 586.

With respect to issue five, whether fixed unit price performance-based contracts are permissible under the JTPA, I find no issue of material fact presented in this case. In fact, both USDOL and DLES agree that this form of contracting was used during the period in question. Rather, the dispute arises as to whether or not such contracts were prohibited under the JTPA regulations in force during the period of the audit.

A fixed unit price performance-based contract is a contract which directs the payment of unit amounts upon the performance of specified services. (CX-1 at 69.) While such contracts may violate the current JTPA regulations, both sides agree that, prior to 1992, there were no regulations prohibiting the use of fixed unit price performance-based contracts. *See* Stipulation 9. Therefore, even viewing the facts in a light most favorable to USDOL, I find that the use of fixed unit price performance-based contracts during the period of 1984 to 1989 did not violate the JTPA or the accompanying regulations. Accordingly, Complainant is entitled to summary judgment on this issue.

Appendix C

All of the remaining issues in this case present questions of material fact that must be resolved by an examination of the merits of this case. Therefore, granting summary judgment on any of these remaining issues would be improper. *See* Fed. R. Civ. P. 56(c). As a result, I am granting only partial summary judgment. More specifically, I will grant Complainant's motion for summary judgement solely on the issue of whether fixed unit price performance-based contracting is permitted by the JTPA. In all other respects, Complainant's motion must be denied.

DISCUSSION AND CONCLUSIONS OF LAW

Pursuant to 20 C.F.R. § 629.57(i),[6] USDOL has the initial burden of production in this case. This means that USDOL must put forth evidence sufficient to establish a *prima facie* case in support of the alleged JTPA violations. This burden requires USDOL to produce relevant evidence "sufficient to enable reasonable person to draw from it the inference sought to be established." McCormick, *Evidence*, 789-790 (2d ed. 1972). Once USDOL has met its *prima facie* burden, the burden of production then shifts to DLES to show compliance with the pertinent provisions of the JTPA. *Maine v. United States Dept. of Labor*, 669 F.2d 827 (1st Cir. 1982). Nonetheless, the ultimate burden of persuasion rests with DLES throughout the entire case. 20 C.F.R. § 629.57(i). The burden of persuasion never shifts to USDOL.

With respect to the first issue of the case, whether DLES inappropriately charged profits to the training cost category, 20 C.F.R. § 629.38(e)(2) provides the relevant law. During the period of the audit, 20 C.F.R. § 629.38(e)(2) set forth three

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6. *See also* 20 C.F.R. § 627.802(e) (1993).

requirements to be met before a cost may be billed entirely to the training category. In such cases, the agreement between the program recipient and the service provider must be for training, must be fixed unit price, and must stipulate "that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant. . . ." 20 C.F.R. § 629.38(e)(2) (1988).

In support of its contention that DLES violated this regulation, USDOL offers only one contract between DLES and Manasota Industry Council, Inc. (Manasota). The Manasota contract does appear to violate the provisions of 20 C.F.R. § 629.38(e)(2) in that the contract contains both fixed unit price characteristics and cost reimbursement characteristics. (RX-3 at 6; Tr. at 202.) However, USDOL produces the Manasota contract alone as evidence that all of the 250 contracts that were the subject of the audit violated 20 C.F.R. § 629.38(e)(2) as well. In fact, the auditor himself admitted that he never even examined the remaining 249 contracts for violations of the JTPA regulations. (Tr. at 218, 220.)

The fact that one contract out of 250 violated 20 C.F.R. § 629.38(e)(2) does not allow a reasonable person to infer that all 250 contracts violated the same provision without any further evidence. Therefore, I find that USDOL has failed to meet its initial burden of production to substantiate its claim that DLES violated 20 C.F.R. § 629.38(e)(2). Without offering further evidence, USDOL cannot expect to overcome even the relatively weak burden of establishing a *prima facie* JTPA violation solely on the basis of the Manasota contract.

The next issue to be decided is whether the DLES contracts violated 20 C.F.R. § 629.37(a), a catch-all regulation with the basic requirement that all costs be "necessary and reasonable

for proper and efficient administration of the [JTPA] program. . . ." Although the scope of this regulation is rather broad, any violation thereunder must be substantiated by the production of specific evidence. Again, however, USDOL bases its finding that the 250 contracts violate 20 C.F.R. § 629.37(a) solely upon an examination of the Manasota contract. Being that information drawn exclusively from the Manasota contract is the only evidence USDOL has produced to support a *prima facie* violation of 20 C.F.R. § 629.37(a), I find that USDOL has failed to meet its preliminary burden of production on this issue as well.

USDOL next alleges that DLES has violated the provisions of Office of Management and Budget (OMB) Circular A-87. The State of Florida adopted the provisions of OMB Circular A-87 in October of 1983 for its own administration of the JTPA program. (RX-1 at A-6). Therefore, there is no question that OMB Circular A-87, issued on January 15, 1981, governs the contracts covered by the audit.[7] In a statement of policy intent, OMB Circular A-87 provides that "[n]o provision for profit or other increment above cost is intended." (RX-1 at G-1.)

USDOL contends that DLES earned substantial profits through its administration of the JTPA program between programs years 1984 and 1989. Clearly, DLES does not dispute this claim. Therefore, the issue to be determined with respect to this alleged violation of OMB Circular A-87 is whether such

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7. In fact, the JTPA regulations contained no provision requiring adherence to OMB circulars during the audit period. The OMB circulars were not incorporated into the regulations with respect to direct and indirect costs until 1991. *See* 20 C.F.R. § 629.37(b) (1991). Prior to 1991, the allowability of direct and indirect costs was governed by 41 C.F.R. 29-70.102 (1984).

profits were improper at the time they were earned. This determination involves an inquiry into both fact and law.

As even Jim Woodward, who conducted the audit in the present case, has admitted, the earning of profits is not a *per se* violation of the JTPA. (Tr. at 245.) Furthermore, nothing in the JTPA or the accompanying regulations prohibited the earning of profits during the period of the audit. (RX-1 at 38-39.) In fact, according to Edward Donahue, who drafted the initial and final determinations, USDOL issued no directives on how excess JTPA income must be categorized until July of 1989. (RX-1 at 52.)

Additionally, the OMB Circular merely states that profits are not "intended" under the JTPA. Stating that the earning of profits is not "intended" cannot be interpreted to mean that profits are prohibited under the JTPA. In fact, OMB did not even purport to address the issue of profits earned by a state under the JTPA. (CX-1 at F-4.) Therefore, OMB Circular A-87 has no applicability to the present case. Since there is no other mention of profits in the circular, I find that the earning of profits by DLES during program years 1984 to 1989 did not violate any provision of OMB Circular A-87.

The next issue is the central issue, and perhaps the only genuine issue, in the present case. USDOL alleges that the several divisions of DLES (i.e. DLET, ESJS and the SDAs) failed to negotiate JTPA contracts at arm's length. As Jim Woodward admitted at the trial, despite USDOL's claim that individual contractual terms violated specific JTPA regulations, the fixed unit price performace-based contracts themselves did not necessarily violate the JTPA. Instead, it is alleged that the general method of contracting employed by the

State of Florida that may be violative of the JTPA. (Tr. at 249-250.)

Again, Woodward concedes that he did not examine the individual contracts within his audit in order to determine that the fixed unit price performace-based contracts were not negotiated at arm's length. (Tr. at 218, 220, 230.) Likewise, Woodward did not look at the criteria according to which DLES awarded JTPA contracts. (Tr. at 248.) Rather, Woodward examined the general scheme for issuing JTPA contracts in the State of Florida. (Tr. at 222, 248.) In other words, Woodward's audit focused primarily on the parties involved in the contracting, as opposed to the contracts themselves. Based on this, Woodward concluded that the contracts in question had the "appearance" of not having been negotiated at arm's length. (Tr. at 250.)

The record does contain a factual basis for Woodward's findings. DLET, a division of DLES, is primarily responsible for formulating state policy with respect to the JTPA. DLET also oversees the procurement process within the various SDAs and monitors the local Job Service Offices. DLET nonetheless entered into several contracts with ESJS, another division of DLES, to provide training and placement services using federal JTPA funds. (RX-1 at A-55.) The resulting contracts placed DLES in the position of being the federal JTPA fund recipient, the state JTPA administrator, as well as a JTPA service provider. In effect, the State of Florida's system gave it a vertical monopoly over federal JTPA funds with respect to the contracts in question, thereby creating an obvious conflict of interest.

As a legal basis for challenging this scheme, USDOL relies upon 20 C.F.R. § 629.37(a) and OMB Circular A-87. While the

general requirement of 20 C.F.R. § 629.37(a) that all JTPA costs be "necessary and reasonable" was in effect during program years 1984 to 1989, there was no language in OMB Circular A-87 that specifically addressed arm's length negotiation during the period of the audit. In fact, while the specific language which USDOL quotes in its brief does list arm's length bargaining as an important consideration in determining the reasonableness of a cost under the JTPA, this language did not appear in the Federal Register until October of 1988. 53 Fed. Reg. 40352, 40354 (1988) (proposed October 14, 1988). Clearly, these proposed amendments to OMB Circular A-87 were not in force during the audit period. Thus, although there was a general requirement that all costs be "reasonable" during the period of the audit, there existed no criteria for determining what constituted a "reasonable" cost. Therefore, OMB Circular A-87 provides no objective for a finding that DLES' contracting practices violated the JTPA at the time of the audit.

The final issue in this case is whether the three-year availability period has lapsed with respect to the funds in question. According to Section 161(b) of the JTPA, DLES must spend JTPA program funds within three years of the receipt of those funds. Any unspent program funds revert to the federal government at the end of the three-year period. 29 U.S.C. § 1571(b).

I find, however, that Section 161(b) is inapplicable to the present case. Section 161(b) applies to program funds only, and up until 1989, profits were not named as program funds. On March 13, 1989, USDOL issued a proposed interpretative rule which states that revenues generated in excess of cost retain their federal character and must be used for JTPA program purposes or be subject to recapture after the three-year

availability period expires. *See* Stipulation 11. As Edward Donahue admitted, this rule did not become effective until July 1, 1989; therefore, it does not govern the period covered by the audit.[8] (RX-1 at 52, 103.) *See also* Stipulation 12, 14. Thus, since USDOL remained silent on the issue of profits as program income until July of 1989, DLES need not have treated excess revenue as program income during the audit period. *See* 20 C.F.R. § 629.32 (1988). Accordingly, as the three-year availability period did not apply to profits earned prior to 1989, I find that no lapse of Section 161(b) occurred.

Finally, I find no basis for applying retroactively the JTPA regulations to which USDOL has cited. According to the Supreme Court, "[r]etroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). In fact, the current law prohibits retroactive application of federal statute and administrative rules and regulations unless the plain language of the statute or regulation so dictates. *id.* Where no such express language exists, retroactivity is presumptively barred unless clear congressional intent commands otherwise. *Landgraf v. USI Film Prods.*, No. 92-757, 1994 U.S. Lexis 3292, at *67 (April 26, 1994).

Finding no express language in the JTPA or the accompanying regulations to support their retroactive application, I must conclude that there is no basis for enforcing the regulations on which USDOL bases its findings retrospectively. Likewise, I find no legislative intent to grant authority to USDOL to enforce rules retroactively under the JTPA. I also recognize that, "[e]ven where some substantial

8. The JTPA regulations themselves did not even define profits as program income until December of 1992. 20 C.F.R. § 627.450(a)(1)(iv) (1993).

justification for retroactive rulemaking is presented, courts should be reluctant to find such authority absent an express statutory grant." *Bowen*, 488 U.S. at 208-209.

In sum, since I find no specific violation of the JTPA or the accompanying regulations as set forth during the period of the audit, I find that DLES need not return to USDOL net profits realized from contracts with ESJS offices during the period covering program years 1984 through 1989. Accordingly, the Grant Officer's final disallowance of $961,003.00 in excess JTPA revenues must be reversed.[9]

ORDER

Accordingly, it is ORDERED that Complainant's motion for summary judgment be GRANTED IN PART AND DENIED IN PART.

It is FURTHER ORDERED that the Final Determination of the Grant Officer be hereby REVERSED.

s/ G. Marvin Bober
G. MARVIN BOBER

Administrative Law Judge

Dated: MAY 2 1994
Washington, D.C.
GMB/mdm

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9. It is important to note that DLES' scheme for administering JTPA funds violates the current regulations. The DLES system only survived administrative review by virtue of the fact that such practices were not specifically addressed by the JTPA regulations until after the audit had been completed. Accordingly, this opinion should not be viewed as a ratification the State of Florida's implementation of the JTPA.

APPENDIX D — RELEVANT REGULATIONS, STATUTES, EXECUTIVE ORDER, AND SENATE REPORT

20 CFR § 627.1

Subpart A — Planning Procedures

§ 627.1 Eligible grant recipient.

To establish a continuing relationship under the Act, the Governor and the Secretary shall sign a Governor/Secretary Agreement. The agreement shall consist of a statement assuring that the State shall comply with (1) the Job Training Partnership Act and the applicable rules and regulations and (2) the Wagner-Peyser Act, as amended, and all applicable rules and regulations. The agreement shall specify that guidelines, interpretations and definitions adopted by the Governor shall, to the extent that they are consistent with the Act and applicable rules and regulations, be accepted by the Secretary.

20 CFR § 629.34

§ 629.34 Procurement.

Subject to the provisions of Section 107 of the Act, recipients and subrecipients shall administer procurement systems that reflect applicable State and local law, rules and regulations as determined by the Governor.

Appendix D

20 CFR 629.35

§ 629.35 Management systems, reporting and record-keeping

(a) The Governor shall ensure that financial systems within the State provide fiscal control and *accounting* procedures sufficient to (1) permit preparation of required reports; (2) permit the tracing of funds to a level of expenditure adequate to establish that funds have not been used in violation of the restrictions on the use of such funds; and (3) demonstrate compliance with matching requirements. (Secs. 104(b)(9), 164(a)(1), 165(a)(1), 156(c)(2), and 182).

(b) The financial management system and the participant data system shall provide federally-required records and reports that are uniform in definition, accessible to authorized Federal and State staff, and verifiable for monitoring, reporting, audit and evaluation purposes (Secs. 165(a)(1), 165(a)(2), and 182).

(c) Pursuant to Section 165(a) of the Act, the Governor shall ensure that records shall be maintained of each participant's enrollment in a JTPA program in sufficient detail to demonstrate compliance with the relevant eligibility criteria attending a particular activity and with the restrictions on the provision and duration of services and specific activities authorized by the Act.

(d) The Governor shall ensure that records shall be maintained of such participant information as may be necessary to develop and measure the achievement of performance standards established by the Secretary.

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(e) The Governor shall insure that procedures are developed for retention of all records pertinent to all grants and agreements, including financial, statistical, property and participant records and supporting documentation, for a period of three years from the date of obligation of funds. Records for nonexpendable property shall be retained for a period of three years after final disposition of the property.

(f) The aforementioned records will be retained beyond the three years if any litigation or audit is begun or if a claim is instituted involving the grant or agreement covered by the records. In these instances, the records will be retained until the litigation, audit or claim has been finally resolved.

(g) In the event of the termination of the relationship with a subrecipient, the Governor of SDA grant recipient, the Governor or SDA grant recipient shall be responsible for the maintenance and retention of the records of any subrecipient unable to retain them.

20 CFR § 629.37

§ 629.37 Allowable costs.

(a) *General.* To be allowable, a cost must be necessary and reasonable for proper and efficient administration of the program, be allocable thereto under these principles, and except as provided herein, not be a general expense required to carry out the overall responsibilities of the Governor or subrecipient. Costs charged to the program shall be consistent with those normally allowed in like circumstances in nonfederally sponsored activities and with applicable State and local law, rules or regulations, as determined by the Governor.

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(b) Direct and indirect costs shall be charged in accordance with 41 CFR 29-70.102.

(c) The Governor shall issue guidelines on allowable costs for SDA and statewide programs that shall include provisions that:

(1) Costs resulting from violations of, or failure to comply with, Federal, State or local laws and regulations are not allowable:

(2) Entertainment costs are not allowable;

(3) Insurance policies offering protection against debts established by the Federal Government are not allowable JTPA costs; and

(4) Personal liability insurance for PIC members is allowable.

(d) The costs of legal expenses required in the administration of grant programs is allowable. Legal services furnished by the chief legal officer of a State of local government or staff solely for the purpose of discharging general responsibilities as a legal officer are unallowable. Legal expenses for the prosecution of claims against the Federal Government are unallowable.

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20 CFR § 629.38(e)(2)

§ 629.38(e)(2) Classification of costs.

* * *

(e) In assigning costs to the training category pursuant to paragraph (a) of this section, the Governor shall ensure that:

* * *

(2) Costs which are billed as single unit charge, do not have to be allocated or prorated among the several costs categories but may be charged entirely to training when the agreement:

(i) Is for training;

(ii) Is fixed unit price; and

(iii) (A) Stipulates that full payment for the full unit price will be made only upon completion of training by a participant and placement of the participant into unsubsidized employment in the occupation trained for and at not less then the wage specified in the agreement.

* * *

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29 U.S.C. § 1501

§ 1501. Congressional declaration of purpose

It is the purpose of this chapter to establish programs to prepare youth and unskilled adults for entry into the labor force and to afford job training to those economically disadvantaged individuals and other individuals facing serious barriers to employment, who are in special need of such training to obtain productive employment.

29 U.S.C. § 1511

§ 1511. Establishment of service delivery areas

(a) Proposals; proposed designations; requests

(1) The Governor shall, after receiving the proposal of the State job training coordinating council, publish a proposed of service delivery areas for the State each of which —

(A) is comprised of the State or one or more units of general local government;

(B) will promote effective delivery of job training services; and (C)(i) is consistent with labor market areas or standard metropolitan statistical areas, but this clause shall not be construed to require designation of an entire labor market area; or

(ii) is consistent with areas in which related services are provided under other State or Federal programs.

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(2) The Council shall include in its proposal a written explanation of the reasons for designating each service delivery area.

(3) Units of general local government (and combinations thereof), business organizations, and other affected persons or organizations shall be given an opportunity to comment on the proposed designation of service delivery areas and to request revisions thereof.

(4)(A) The Governor shall approve any request to be a service delivery area from —

(i) any unit of general local government with a population of 200,000 or more;

(ii) any consortium of contiguous units of general local government with an aggregate population of 200,000 or more which serves a substantial part of a labor market area; and

(iii) any concentrated employment program grantee for a rural area which served as a prime sponsor under the Comprehensive Employment and Training Act.

(B) The Governor may approve a request to be a service delivery area from any unit of general local government or consortium of contiguous units of general local government, without regard to population, which serves a substantial portion of a labor market area.

(c) If the Governor denies a request submitted under subparagraph (A) and the entity making such request alleges

that the decision of the Governor is contrary to the provision of this section, such entity may appeal the decision to the Secretary, who shall make a final decision within 30 days after such appeal is received.

(b) Final designation by Governor

The Governor shall make a final designation of service delivery areas within the State. Before making a final designation of service delivery areas for the State, the Governor shall review the comments submitted under subsection (a)(3) of this section and requests submitted under subsection (a)(4) of this section.

(c) Redesignations

(1) In accordance with subsection (a) of this section, the Governor may redesignate service delivery areas no more frequently than every two years. Such redesignations shall be made not later than 4 months before the beginning of a program year.

(2) Subject to paragraph (1), the Governor shall make such a redesignation if a petition to do so is filed by an entity specified in subsection (a)(4)(A) of this section.

(3) The provisions of this subsection are subject to section 1515(c) of this title.

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29 U.S.C. § 1515

§ 1515. Review and approval of plan

(a) Times for publication of plan and modifications

(1) Not less than 120 days before the beginning of the first of the two program years covered by the job training plan —

(A) the proposed plan or summary thereof shall be published; and

(B) such plan shall be made available for review and comment to —

(i) each house of the State legislature for appropriate referral;

(ii) appropriate local educational and other public agencies in the service delivery area, and

(iii) labor organizations in the area which represent employees having the skills in which training is proposed; and

(C) such plan shall be reasonably available to the general public through such means as public hearings and local news facilities.

(2) The final plan, or a summary thereof, shall be published not later than 80 days before the first of the two program years and shall be submitted to the Governor in accordance with section 1513(d)(2) of this title. Any

modification shall be published not later than 80 days before it is effective and shall be submitted to the Governor in accordance with such section.

(b) Governor's approval of plan: criteria, time, and petitions opposing

(1) The Governor shall approve the job training plan or modification thereof unless he finds that —

(A) corrective measures for deficiencies found in audits or in meeting performance standards from previous years have not been taken or are not acceptably underway;

(B) the entity proposed to administer the program does not have the capacity to administer the funds;

(C) there are inadequate safeguards for the protection of funds received;

(D) the plan (or modification) does not comply with a particular provision or provisions of this chapter or of regulations of the Secretary under this chapter, or

(E) the plan (or modification) does not comply with the criteria under section 1531(b) of this title coordinating activities under this chapter with related program activities.

(2) The Governor shall approve or disapprove a job training plan (or modification) within 30 days after the date that the plan (or modification) is submitted, except that if a petition is filed under paragraph (3) such period shall be extended to 45

days. Any disapproval by the Governor may be appealed to the Secretary, who shall make a final decision of whether the Governor's disapproval complies with paragraph (1) of this subsection within 45 days after receipt of the appeal.

(3)(A) Interested parties may petition the Governor with 15 days of the date of submission for disapproval of the plan or modification thereof if —

(i) the party can demonstrate that it represents a substantial client interest,

(ii) the party took appropriate steps to present its views and seek resolution of disputed issues prior to submission of the plan to the Governor, and

(iii) the request for disapproval is based on a violation of statutory requirements.

(B) If the Governor approves the plan (or modification), the Governor shall notify the petitioner in writing of such decisions and the reasons therefor.

(c) Redesignation of service delivery areas and private industry councils

(1) If a private industry council and the appropriate chief elected official or officials fail to reach the agreement required under section 1513(b) or (d) of this title and, as a consequence, funds for a service delivery area may not be made available under section 1514 of this title, then the Governor shall redesignate, without regard to sections[1] 1511(a)(4) and (c)(1) of

1. So in original. Probably should be "section".

this title, the service delivery areas in the State to merge the affected area into one or more other service delivery areas, in order to promote the reaching of agreement.

(2) In any State in which service delivery areas are redesignated under paragraph (1), private industry councils shall, to the extent necessary for the redesignation, be reconstituted and job training plans modified as required to comply with sections 1512 and 1513 of this title. Services under an approved plan shall not be suspended while the council is reconstituted and the plan is modified.

(d) Authority of Secretary in single plan States

In any case in which the service delivery area is a State, the plan (or modification) shall be submitted to the Secretary for approval. For the purpose of this subsection, the Secretary shall have the same authority as the Governor has under this section.

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Executive Order 12612 — Federalism

SOURCE: The provisions of Executive Order 12612 of Oct. 26, 1987, appeal at 52 FR 41685, 3 CFR, 1987 Comp., p. 252, unless otherwise noted.

By the authority vested in me as President by the Constitution and laws of the United States of America, and in order to restore the division of governmental responsibilities between the national government and the States that was intended by the Framers of the Constitution and to ensure that the principles of federalism established by the Framers guide the Executive departments and agencies in the formulation and implementation of policies, it is hereby ordered as follows:

SECTION 1. *Definitions.* For purposes of this Order:

(a) "Policies that have federalism implications" refers to regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or the distribution of power and responsibilities among the various level of government.

(b) "State" or "States" refer to the States of the United States of America, individually or collectively, and, where relevant, to State governments, including units of local government and other political subdivisions established by the States.

SEC. 2. *Fundamental Federalism Principles.* In formulating and implementing policies that have federalism implications. Executive departments and agencies shall be guided by the following fundamental federalism principles:

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(a) Federalism is rooted in the knowledge that our political liberties are best assured by limiting the size and scope of the national government.

(b) The people of the States created the national government where they delegated to it those enumerated governmental powers relating to matters beyond the competence of the individual States. All other sovereign powers, save those expressly prohibited the States by the Constitution, are reserved to the States or to the people.

(c) The constitutional relationship among sovereign government State and national, is formalized in and protected by the Tenth Amendment to the Constitution.

(d) The people of the States are free, subject only to restrictions in the Constitution itself or in constitutionally authorized Acts of Congress, to define the moral, political, and legal character of their life.

(e) In most areas of governmental concern, the States uniquely progress the constitutional authority, the resources, and the competence to discern the sentiments of the people and to govern accordingly. In Thomas Jefferson's words, the States are "the most competent administration for our domestic concerns and the surest bulwarks against antirepublican tendencies."

(f) The nature of our constitutional system encourages a healthy diversity in the public policies adopted by the people of the several States according to their own conditions, needs, and desires. In the search for enlightened public policy, individual States and communities are free to experiment with a variety of approaches to public issues.

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(g) Acts of the national government — whether legislative, executive or judicial in nature — that exceed the enumerated powers of that government under the Constitution violate the principle of federalism established by the Framers.

(h) Policies of the national government should recognize the responsibility of — and should encourage opportunities for — individuals, families, neighborhoods, local governments, and private associations to achieve their personal, social, and economic objectives through cooperative effort.

(i) In the absence of clear constitutional or statutory authority, the presumption of sovereignty should rest with the individual States. Uncertainties regarding the legitimate authority of the national government should be resolved against regulation at the national level.

SEC. 3. *Federalism Policymaking Criteria.* In addition to the fundamental federalism principles set forth in section 2, Executive department and agencies shall adhere, to the extent permitted by law, to the following criteria when formulating and implementing policies that have federalism implications:

(a) There should be strict adherence to constitutional principles. Executive departments and agencies should closely examine the constitutional and statutory authority supporting any Federal action that would limit the policymaking discretion of the States, and should carefully assess the necessity for such action. To the extent practicable, the states should be consulted before any such action is implemented. Executive Order No. 12372 ("Intergovernmental Review of Federal Programs") remains in effect for the programs' and activities to which it is applicable.

(b) Federal action limiting the policymaking discretion of the States should be taken only where constitutional authority for the action is clear and certain and the national activity is necessitated by the presence of a problem of national scope. For the purposes of this Order:

(1) It is important to recognize the distinction between problems of national scope (which may justify Federal action) and problems that are merely common to the States (which will not justify Federal action because individual States, acting individually or together, can effectively deal with them).

(2) Constitutional authority for Federal action is clear and certain only when authority for the action may be found in a specific provision of the Constitution, there is no provision in the Constitution prohibiting Federal action, and the action does not encroach upon authority reserved to the States.

(c) With respect to national policies administered by the States, the national government should grant the States the maximum administrative discretion possible. Intrusive, Federal oversight of State administration is neither necessary nor desirable.

(d) When undertaking to formulate the implement policies that have federalism implications, Executive departments and agencies shall:

(1) Encourage States to develop their own policies to achieve program objectives and to work with appropriate officials in other States.

(2) Refrain, to the maximum extent possible, from

establishing uniform, national standards for programs and, when possible, defer to the States to establish standards.

(3) When national standards are required, consult with appropriate officials and organizations representing the States in developing those standards.

SEC. 4. *Special Requirements for Preemption.* (a) To the extent permitted by law, Executive departments and agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only when the statute contains an express preemption provision or there is in some other firm and palpable evidence compelling the conclusion that the Congress intended preemption of State law, or when the exercise of State authority directly conflicts with the exercise of Federal authority under the Federal statute.

(b) Where a Federal statute does not preempt State law (as addressed in subsection (a) of this section), Executive departments and agencies shall construe any authorization in the statute for the issuance of regulations as authorizing preemption of State law by rule-making only when the statute expressly authorizes issuance of preemptive regulations or there is some other firm and palpable evidence compelling the conclusion that the Congress intended to delegate to the department or agency the authority to issue regulations preempting State law.

(c) Any regulatory preemption of State law shall be restricted to the minimum level necessary to achieve the objectives of the statute pursuant to which the regulations are promulgated.

(d) As soon as an Executive department or agency foresees the possibility of a conflict between State law and Federally protected interests within its area of regulatory responsibility, the department or agency shall consult, to the extent practicable, with appropriate officials and organizations representing the States in an effort to avoid such a conflict.

(e) When an Executive department or agency proposes to act through adjudication or rule-making to preempt State law, the department of agency shall provide all affected States notice and an opportunity for appropriate participation in the proceedings.

SEC. 5. *Special Requirements for Legislative Proposals.* Executive departments and agencies shall not submit to the Congress legislation that would:

(a) Directly regulate the states in ways that would interfere with functions essential to the States' separate and independent existence or operate to directly displace the States' freedom to structure integral operations in areas of traditional governmental functions;

(b) Attach to Federal grants conditions that are not directly related to the purpose of the grant; or

(c) Preempt State law, unless preemption is consistent with the fundamental federalism principles set forth in section 2, and unless a clearly legitimate national purpose, consistent with the federalism policymaking criteria set forth in section 3, cannot otherwise be met.

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SEC. 6. *Agency Implementation.* (a) The head of each Executive department and agency shall designate an official to be responsible for ensuring the implementation of this Order.

(b) In addition to whatever other actions the designated official may take to ensure implementation of this Order, the designated official shall determine which proposed policies have sufficient federalism implications to warrant the preparation of a Federalism Assessment. With respect to each such policy for which an affirmative determination is made, a Federalism Assessment, as described in subsection (c) of this section, shall be prepared. The department or agency head shall consider any such Assessment in all decisions involved in promulgating and implementing the policy.

(c) Each Federalism Assessment shall accompany any submission concerning the policy that is made to the Office of Management and Budget pursuant to Executive Order No. 12291 or OMB Circular No. A-19, and shall:

(1) Contain the designated official's certification that the policy has been assessed in light of the principles, criteria, and requirements stated in sections 2 through 5 of this Order,

(2) Identify any provision or element of the policy that is inconsistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order;

(3) Identify the extent to which the policy imposes additional costs or burdens on the States, including the likely source of funding for the States and the ability of the States to fulfill the purposes of the policy; and

(4) Identify the extent to which the policy would affect the States' ability to discharge traditional State governmental functions, or other aspects of State sovereignty.

SEC. 7 *Government-wide Federalism Coordination and Review.* (a) In implementing Executive Order Nos. 12291 and 12498 and OMB Circular No. A-19, the Office of Management and Budget, to the extent permitted by law and consistent with the provisions of those authorities, shall take action to ensure that the policies of the Executive departments and agencies are consistent with the principles, criteria, and requirements stated in sections 2 through 5 of this Order.

(b) In submissions to the Office of Management and Budget pursuant to Executive Order No. 12291 and OMB Circular No. A-19, Executive departments and agencies shall identify proposed regulatory and statutory provisions that have significant federalism implications and shall address any substantial federalism concern. Where the departments or agencies deem it appropriate, substantial federalism concerns should also be addressed in notices of proposed rule-making and message submitting legislative proposals to the Congress.

SEC. 8. *Judicial Review.* This Order is intended only to improve the internal management of the Executive branch, and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.

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LEGISLATIVE HISTORY
P.L. 97-300

JOB TRAINING PARTNERSHIP ACT

P.L. 97-300, see page 96 Stat. 1322

Senate Report (Labor and Human Resources Committee) No. 97-469, June 9, 1982 [To accompany S. 2036]

House Report (Education and Labor Committee) No. 97-537, May 17, 1982 [To accompany H.R. 5320]

House Conference Report No. 97-889, Sept. 28, 1982 [To accompany S. 2036]

Cong. Record Vol. 128 (1982)

DATES OF CONSIDERATION AND PASSAGE

Senate July 1, September 30, 1982

House August 4, October 1, 1982

The Senate bill was passed in lieu of the House bill. The Senate Report (this page) and the House Conference Report (page 2705) are set out.

SENATE REPORT NO. 97-469

The Committee on Labor and Human Resources, to which was referred the bill (S. 2036) to provide for a job training program and for other purposes, having considered the same,

reports favorably thereon with an amendment and recommends that the bill as amended do pass.

THE NEED FOR LEGISLATION

The authorization of the comprehensive and Training Act expires this year. This nation needs a new job training program for the drop-out youth who are not prepared for employment, for welfare recipients who need training to escape from dependency, for the economically disadvantaged who cannot compete in the labor market without help. We also need a training program for the dislocated worker who needs new skills for the new jobs being created by the changing economy. The federal government has a responsibility to help meet these training needs.

New Legislation must be based on four basic principles which are essential for an effective job training program. These principles are:

First, the new legislation must provide for the involvement of the private sector in the design and administration of training programs. Under the current CETA system, business involvement has been limited to Title VII programs, and there is no requirement for the involvement of the private sector in all aspects of the program. Such involvement is essential because it is the private sector which will employ the graduates of the training programs and it is only those who will employ the graduates who can really define the kinds of training programs that are needed.

Second, job training legislation must recognize the true principles of federalism. The current CETA system limits the

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Governor to Balance of State and special statewide programs and bypasses him altogether in other cases which provide for a direct Federal to local government relationship. The new legislation will recognize the role of the state in all local programs and end the excessive involvement of the federal government.

Third, job training legislation must truly be a training legislation and not an income maintenance program. The current CETA system has provisions relating to mandatory allowances and public service employment for which justifications include providing income transfers as well as job training and employment. The new legislation repeals these provisions.

Fourth, the legislation must insist on performance. The current CETA system does not have any effect means of measuring program results or penalizing non-performance. The new legislation will provide standards for judging the programs by what they accomplish — by whether those trained are hired and earn more as a result of training. It will end federal involvement with the process of how people are to be trained. It will provide for measurement of the outcomes and remove the Federal government from involvement in the details of program operations.

In addition to these basic principles, the legislation must address two other items of major concern.

First, new legislation must emphasize the need to provide training for the dislocated workers who have no realistic prospect of returning to the job from which they are laid off. Other federal laws emphasize income transfers for these

workers. Under the best of circumstances hundreds of thousands of workers in the automobile industry and other basic industries may not return to their lifetime work. We must identify those workers who cannot go back to their old jobs and provide retraining for the new and expanding occupations which exist in the economy at the present time.

Finally, new legislation must provide for coordination between the multiciplicity of employment and training programs that now exist. Coordination under current law is fragmentary at best.

The bill which has been reported by the Committee is based on these principles and addresses these concerns.

PRIVATE SECTOR INVOLVEMENT

The first principle the bill is designed to address is the active involvement of private industry. This objective is accomplished through the private industry councils. The council will have a majority of members from the private sector with other representatives coming from local government, education, community-based organizations, labor unions, economic development organizations and the public employment service. The private industry council will plan the training programs. The program plan will specify how job training in a community will be carried out. The plan will identify occupations for which skill training will be conducted. It will select organizations to provide the training. It will specify arrangements for administering the program in the community. It will determine how resources are allocated. The completed program plan will be prepared by the private industry council but it will be submitted jointly with the local

government in order to establish the kind of private-public partnership that all witnesses agreed is essential for an effective job training program. If agreement between these parties cannot be reached, the Governor will settle the issue. Private sector involvement will not be limited to the local level although that is the essential place in which training programs are run. Private sector involvement is also provided for in the state job training council in which the private sector will also have a majority of representatives. That state job training council will review locally developed plans and will also have substantial involvement in state-wide administration. This expanded role for the private sector is one of the fundamental principles on which the new job training legislation is based.

FEDERALISM

The second major principle on which the legislation is based is on a recognition of the distinct but legitimate roles of federal, state and local government. The responsibilities of each will change from what they are under current law. Under the legislation reported by the committee, the state will be the key actor in the approval of job training programs. First, and perhaps most important, the state will define the structure of the delivery system through the determination of service delivery areas. This critical determination will be done by the Governor after receiving the proposals of the state job training council and after reviewing the proposals of local government and business officials. The Governor will also be in charge of approving locally developed plans, of monitoring and auditing the performance of plans, of insuring fiscal responsibility and compliance with Federal mandates as well as of running statewide programs. In short, the basic supervisory role previously performed by the federal government will now be

turned over to the state, the place where it really belongs. It is important to add that the state will provide basic guidelines for the planning of local area plans.

Local elected officials will work in partneship with representatives from their businesses, education and labor communities in the planning and implementation of job training programs. They will appoint the members of the private industry councils and will work with PICs to set local priorities in consort with state goals and design programs to meet them.

The federal government will be responsible for developing nationwide performance standards, operating national programs, conducting research, demonstration and evaluation activities, and monitoring state performance.

TRAINING, NOT INCOME MAINTENANCE

The third principle on which this legislation is based is that a training program must be truly a training program and not income maintenance. The Comprehensive Employment and Training Act provided not only training but also income to participants in the form of public service employment through the provisions mandating allowances for persons in institutional training and through the work experience program in which persons were paid to perform work regardless of whether it increased their employability. The new legislation has a single objective. It is to prepare people for employment. The object is not income maintenance and the provisions relating to public service employment and mandatory allowances in the old law have all been repealed. The provisions of the legislation are carefully designed to ensure that at least 70 percent of all the funds expended will go into direct training

expenses with the remainder going only for essential administrative support and the kinds of supportive services without which participants would not be able to take advantage of the training opportunities.

PERFORMANCE NOT PROCESS

The next principle on which the bill is based is that the federal role must be to establish standards for program performance. In the past, the federal government prescribed at considerable length and in considerable detail how training programs are to be conducted, which too often resulted in excessive regulation. This bill departs from that practice. Instead, the role of the federal government is to specify what the results of training programs must be. The bill requires the Secretary to establish performance standards which will measure the results achieved by federal, state, and local training programs, leaving the private industry council free to design specific programs in order to achieve those specified outcomes. These standards will ensure that adults who go into training earn more than they did before they entered the program and that youth are provided the employability skills they need to secure private sector employment. If these results are achieved, the federal objectives will have been met. The federal responsibility is not to specify how the results are to be accomplished but to ensure that the expenditure of federal funds achieves the objectives intended by the legislation. This is an important step and consistent with government-wide emphasis on deregulation which is so critical to true local decision-making and more effective program management.

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DISLOCATED WORKERS

The bill contains a separate title to provide retraining for dislocated workers — that is, workers who have no reasonable prospect of returning to their old employment because of plant closing or other dislocations in the economy. The evidence is clear that there are at least one half million jobs in the automobile industry-related employment that are permanently lost even if sales return to their previous levels. In the past we have ended to provide unemployment insurance and other income maintenance benefits for these . . .

* * *

JOB TRAINING PARTNERSHIP

The Committee also feels that the mix of governmental and business representatives is useful and appropriate, but that the role of Federal agency heads should be advisory. Therefore, the Committee bill includes federal agency heads in the membership as non-voting members.

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TITLE III: ADMINISTRATIVE AND GENERAL PROVISIONS

SUPERVISION OF THE PROGRAM — THE ROLE OF THE GOVERNOR AND OF THE SECRETARY OF LABOR

The core of the Training For Jobs program is its reliance on local decision-making by the private industry council and the development of an effective private-public partnership to plan and administer job training programs. However, the Committee recognizes the need to ensure that such local decision-making is consistent with statutory criteria and that there be effective mechanisms for ensuring that the program produces results.

Under the bill, the basic supervisory role is given to the Governor, acting with the advice of the State Job Training Council. The Governor determines service delivery areas, the Governor prepares the State goals and objectives to guide local planning, the governor approves local plans, the Governor resolves differences between the private industry council and the local government. Further, it is the State which is required to establish fiscal control and accounting procedures and it is the State which is responsible for ensuring financial and compliance audits. The Committee does not intend that there be additional layers of bureaucracy in the program — rather it has transferred to the State level these functions previously performed by the Secretary, in general through the Department's regional offices.

The Secretary does retain a role in the management of the system. By far the most important one is the setting of performance criteria. The Committee cannot overemphasize that the Federal role is not to determine how programs are to be

designed or administered but rather to set the standards against which program performance is to be measured. The Committee does not expect lengthy Federal regulations; it does expect prompt promulgation of effective performance criteria. (see below)

The Secretary of Labor does retain management responsibilities for the local programs which are specified in sections 304 and 306. Most importantly, he is required to monitor recipients and subrecipients to ensure that they are complying with the Act.

PERFORMANCE STANDARDS

It is a fundamental premise of this bill that job training is an investment in human capital which will pay dividends by increasing the productive capacity of the participants as measured by in- . . .

* * *